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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 EUGENE EVAN BAKER,) NO. CV 10-3996-SVW (AJWx)
11)
12 Plaintiff,)
13 v.) ORDER GRANTING DEFENDANT'S
14 ERIC H. HOLDER, JR.,) MOTION TO DISMISS COMPLAINT
ATTORNEY GENERAL) WITH PREJUDICE [6]
15 Defendants.) JS6
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20 **I. BACKGROUND**

21 On May 27, 2010, Eugene Evan Baker ("Plaintiff") filed a Complaint
22 seeking declaratory and injunctive relief from the Attorney General so
23 he could purchase a firearm. Plaintiff was convicted of a misdemeanor
24 crime of domestic violence ("MCDV") in California in 1997. Compl. ¶ 1.
25 Under 18 U.S.C. § 922(g)(9) ("The Gun Control Act"), Congress has made
26 it "unlawful for any person who has been convicted in any court of a
27 misdemeanor crime of domestic violence . . . to possess . . . any
28 firearm." Title 18, U.S.C. § 921(33)(B)(ii) carves out an exception to
this general rule, stating, "A person shall not be considered to have

1 been convicted of such an offense for purposes of this chapter if the
 2 conviction has been expunged or set aside . . . unless the pardon,
 3 expungement, or restoration of civil rights expressly provides that the
 4 person may not . . . possess . . . firearms."

5 In 2002, that conviction was set aside, or "expunged" under Cal.
 6 Penal Code § 1203.4.¹ Compl. ¶ 1. The expungement order was silent as
 7 to Plaintiff's rights to possess firearms. Based solely on these facts
 8 alone in his Complaint, Plaintiff asks this Court to "Issue a judicial
 9 Declaration that since October 20th, 2007, [Plaintiff] has been
 10 entitled to exercise his rights under the Second Amendment to the
 11 Constitution of the United States and that he is entitled under federal
 12 law to purchase . . . firearms . . . without risk and threat of
 13 prosecution. . . ." Compl. ¶ 2.

14 The Attorney General ("Defendant") then filed a Motion to Dismiss
 15 Under FRCP 12(b)(1), arguing Plaintiff had suffered no injury in fact
 16 and the case was not ripe. In addition, under FRCP 12(b)(6), Defendant
 17 argued that Jennings v. Mukasey, 511 F.3d 894 (9th Cir. 2007), squarely
 18 disposed of Plaintiff's Complaint.

19 In response, Plaintiff improperly supplemented the facts in his
 20 Complaint in his Opposition to Defendant's Motion. Plaintiff added
 21 that on June 8th, 2009, Plaintiff went to a gun show and attempted to
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23 ¹The Court notes that Plaintiff's briefs and complaint assert the
 24 position that the set aside was completed under California Penal Code
 25 Section 1203.4 subdivision (a), not Section 1203.4a. In relevant
 part, California Penal Code Section 1203.4(a) states:

26 "In any case in which a defendant has fulfilled the conditions
 27 of probation . . . the court shall set aside the verdict of guilty .
 28 . . and dismiss the accusations . . . against the defendant and . . .
 he or she shall thereafter be released from penalties and
 disabilities resulting from the offense of which he or she has been
 convicted. . . ."

1 purchase a firearm. Upon tendering the payment and applying for the
2 weapon, Plaintiff was rejected because of his prior MCDV. After
3 Plaintiff's counsel requested a response from the California Department
4 of Justice, Plaintiff discovered that he was on a list of people
5 prohibited from purchasing firearms under the Gun Control Act and state
6 laws. Plaintiff then went to Superior Court, requested, and received,
7 a declaration stating he was free to purchase firearms under the laws
8 of the State of California under the terms of his expungement.
9 However, he is currently still barred from purchasing a firearm under
10 the Federal Gun Control Act.

11 **II. MOTION TO DISMISS**

12 **A. Legal Standard**

13 A challenge to the Court's jurisdiction is brought under Federal
14 Rule of Civil Procedure 12(b)(1). A Rule 12(b)(1) motion may be based
15 on a facial challenge to the sufficiency of the jurisdictional
16 allegations in the complaint. "[W]hen this type of attack is mounted,
17 the court must accept as true all well-pleaded facts and draw all
18 reasonable inferences in favor of the plaintiff." Nasoordeen v. FDIC,
19 No. CV 08-05631 MMM (AJWx), 2010 WL 1135888 at *5 (C.D. Cal., Mar. 17,
20 2010) (citing Ass'n of Am. Med. Colleges v. United States, 217 F.3d
21 770, 778-79 (9th Cir. 2000)).

22 On a 12(b)(6) Motion to Dismiss, a plaintiff's complaint "must
23 contain sufficient factual matter, accepted as true, to 'state a claim
24 to relief that is plausible on its face.'" Ashcroft v. Iqbal, __ U.S.
25 __, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v.
26 Twombly, 550 U.S. 544 (2007)). "A claim has facial plausibility when
27 the plaintiff pleads factual content that allows the court to draw the
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1 reasonable inference that the defendant is liable for the misconduct
2 alleged." Id. A complaint that offers mere "labels and conclusions"
3 or "a formulaic recitation of the elements of a cause of action will
4 not do." Id.; see also Moss v. U.S. Secret Service, 572 F.3d 962, 969
5 (9th Cir. 2009) (citing Iqbal, 129 S.Ct. at 1951).

6 When a court grants a motion to dismiss, ordinarily "any
7 dismissal[,] . . . except one for lack of jurisdiction, improper venue,
8 or failure to join a party under Rule 19[,] operates as an adjudication
9 on the merits." Fed. R. Civ. P. 41(b). However, the court may specify
10 that the dismissal is without prejudice to refiling the claim in a
11 separate action. See, e.g., Swaida v. Gentiva Health Services, 238 F.
12 Supp. 2d 325, 328 (D. Mass. 2002) ("dismissal [is] presumed to be with
13 prejudice unless the order explicitly states otherwise"); Seaweed, Inc.
14 v. DMA Product & Design & Marketing LLC, 219 F. Supp. 2d 551, 554
15 (S.D.N.Y. 2002) (when dismissal "does not operate on the merits" it
16 "should not issue with prejudice"). In addition, the court may grant
17 the plaintiff leave to amend a deficient claim "when justice so
18 requires." Fed. R. Civ. P. 15(a)(2).

19 **B. Standing and Ripeness as a Basis to Dismiss Under FRCP**
20 **12(b)(1)**

21 The Court finds that the Complaint, as currently pled, is
22 insufficient in presenting a live controversy under Article III, §2.
23 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To
24 establish a "case or controversy," Plaintiff must show an "injury in
25 fact" that is concrete and not conjectural. Lujan, 504 U.S. at 560-61.
26 Similarly, "A claim is not ripe for adjudication if it rests upon
27 contingent future events that may not occur as anticipated." Texas v.
28 United States, 523 U.S. 296, 300 (internal quotation marks omitted).

1 Here, Plaintiff's Complaint only states that he was convicted of a
2 prior misdemeanor crime of domestic violence and that this crime had
3 been "expunged" by the State of California. As discussed above,
4 Plaintiff's Complaint does not allege that he ever attempted to
5 purchase a firearm or that he was ever denied. These facts are instead
6 improperly included in Plaintiff's arguments in the Opposition to
7 Defendant's Motion to Dismiss. As discussed in Part II.A., a complaint
8 must plead sufficient facts to establish the Court's jurisdiction to
9 survive a 12(b)(1) motion to dismiss. Here, Plaintiff's complaint does
10 not establish Article III jurisdiction because he fails to allege that
11 he faces any concrete injury in fact or that Defendant may ever attempt
12 to hinder his rights to own a firearm.

13 Plaintiff has not sought to amend his Complaint. Thus, the
14 Complaint should be dismissed without prejudice for this reason alone.

15 **C. *Jennings* as a Basis to Dismiss With Prejudice Under FRCP**
16 **12(b)(6)**

17 Defendant also argues that regardless of whether Plaintiff's
18 additional facts in his Opposition are included in the Complaint, under
19 the Ninth Circuit's recent interpretation of this very issue,
20 Plaintiff's complaint cannot state a claim upon which relief can be
21 granted under FRCP 12(b)(6).

22 In Jennings, a petitioner sought a review of the Bureau of
23 Alcohol, Tobacco, and Firearms' ("ATF") denial of his application for a
24 renewal of a firearms license. Jennings, 511 F.3d at 896. The
25 petitioner had previously been convicted in California of a MCDV and
26 had his conviction expunged by a 1999 expungement order, similar to the
27 Plaintiff's expungement order in this case. Id. The petitioner argued
28 that under 18 U.S.C. § 921(33)(B)(ii) and because of his expungement

1 pursuant to California Penal Code Section 1203.4 subd. (a), he was not
2 prohibited by the Federal Gun Control Act in possessing firearms. Id.
3 Nonetheless, the Ninth Circuit found that a state court order under §
4 1203.4 subd. (a) did not "expunge" the petitioner's conviction for the
5 purposes of 18 U.S.C. § 922(g)(9), which prohibits those convicted of a
6 misdemeanor crime of domestic violence from possessing firearms.² Id.
7 at 898-99.

8 It is undisputed that Plaintiff makes the same argument that the
9 petitioner made in Jennings. Opp'n at 15-16. Instead, Plaintiff
10 suggests that this court should not follow binding Ninth Circuit
11 precedent because "the Jennings opinion is worthless as precedent."
12 Opp'n at 16. Plaintiff cites to Supreme Court cases and Ninth Circuit
13 decisions predating Jennings, urging the Court to decide the issue
14 differently. However, none of these cases change the fact that
15 Jennings precisely controls this case. Plaintiff also cites to two
16 Supreme Court cases after Jennings, District of Columbia v. Heller, 544
17 U.S. ____ (2008) and McDonald v. City of Chicago, 561 U.S. ____ (2010),
18 which hold that rights under the Second Amendment are fully applicable
19 to the states. Plaintiff claims these cases "evidence a growing
20 acceptance and expansion of the right to bear arms." Opp'n 21.
21 Whether or not this is true, as Plaintiff himself admits, "neither case
22 specifically addresses the issues brought forth herein." Opp'n 21.

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26 ²The Court notes that the Jennings court did not reach the issue of
27 whether 1203.4a, rather than 1203.4 subd. (a), would require the same
28 result. Id. at 899-900. However, it is undisputed in this case that
Plaintiff received an "expungement" under 1203.4 subd. (a), which was
in fact addressed by Jennings.


1 **III. CONCLUSION**

2 Plaintiff's Complaint is initially deficient for failing to plead
3 facts establishing a case or controversy under Article III, §2.
4 However, even if the additional facts stated in Plaintiff's Opposition
5 were pled in Plaintiff's Complaint, Plaintiff's arguments are directly
6 controlled by Jennings.

7 Having cited no contravening authority on point after Jennings,
8 Plaintiff cannot succeed in this case. The Court has no power to
9 disregard binding precedent as the Plaintiff urges. Thus, Plaintiff's
10 Complaint is DISMISSED WITH PREJUDICE.

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13 IT IS SO ORDERED.

14 DATED: October 26, 2010

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17 STEPHEN V. WILSON
18 UNITED STATES DISTRICT JUDGE
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